No. 79-5602

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In the Supreme Court of the United States

OCTOBER TERM, 1979

FEODOR FEDORENKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 57a-66a) is reported at 597 F. 2d 946. The opinion of the district court (Pet. App. 1a-56a) is reported at 455 F. Supp. 893.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1979. A petition for rehearing was denied on August 15, 1979. The petition for a writ of certiorari was filed on October 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's failure to disclose, in obtaining a visa in 1949, that he had been an armed guard at the Treblinka concentration camp during the Nazi occupation of Poland was a "material" misrepresentation of fact under 8 U.S.C. 1451(a).

2. Whether a district court possesses an equitable discretion to excuse a material misrepresentation of fact under 8 U.S.C. 1451(a) and to allow a person who procured his naturalization by fraud to retain United States citizenship.

STATEMENT

The United States brought this action in the United States District Court for the Southern District of Florida under 8 U.S.C. 1451(a)[1] to revoke the citizenship of petitioner, who was born in the Ukraine in 1907, entered the United States under the Displaced Persons Act, ch. 647, 62 Stat. 1009, in 1949, and became a naturalized citizen in 1970. The gravamen of the government's complaint was that petitioner had served as an armed guard at the Nazi concentration camp at Treblinka, Poland, from 1942 to 1943 and had concealed that fact

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[1] 8 U.S.C. 1451(a) provides in pertinent part:

> It shall be the duty of the United States attorneys * * * to institute proceedings * * * in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation * * *.

in applying for and obtaining a visa to enter this country.[2]

1. The evidence at trial showed that petitioner was captured by the Germans in 1941 while serving in the Russian army (Tr. 1254, 1258-1261). After being held in a series of camps, petitioner was selected to go to the German camp at Travnicki, Poland, a training station for concentration camp guards (Tr. 1275-1276, 1284, 1435). Petitioner was eventually assigned to the death camp at Treblinka, where he was issued a rifle and assigned to guard duty (Tr. 1439, 1297-1298, 1440, 1309). Petitioner was stationed at Treblinka for about a year, during which time he was awarded good conduct stripes and was given the rank or title of "oberwachmann" because of his proficient service (Tr. 1489-1492, 1499-1500).[3] Petitioner repeatedly acknowledged in his testimony that he knew that the Jews who arrived at Treblinka were being murdered (Tr. 1442, 1452, 1461, 1465, 1578).

After an armed uprising at Treblinka resulted in the closing of that camp, petitioner was transferred to a series of other camps, finally ending up in Hamburg when that city was liberated by the British in 1945 (Tr.

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[2]The United States bears the burden of proving its case under 8 U.S.C. 1451(a) by "clear, unequivocal and convincing" evidence. See *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943); *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960). The court of appeals found that the government had met that burden here (Pet. App. 64a).

[3]The government also presented six witnesses, each a survivor of Treblinka, who testified that they saw petitioner shoot, whip or beat prisoners at the camp. See, *e.g.*, Tr. 134-135, 143, 145, 267-268, 271, 322-323, 434, 435-442, 884-887, 973, 1014-1015, 1039-1040, 1056-1067, 1070, 1072. The court of appeals held that, in light of petitioner's admitted misrepresentation in obtaining a visa, there was no need to address the significance of this evidence (Pet. App. 65a).

1358-1365). Petitioner passed as a civilian at that time and for the next four years worked as laborer (Tr. 1365-1366, 1509).

In 1948, Congress enacted the Displaced Persons Act, ch. 647, 62 Stat. 1009, to enable refugees who had been driven from their homelands during and after World War II to emigrate to the United States without regard to otherwise applicable immigration quotas (Tr. 723-724). The Act's definition of "eligible displaced persons" entitled to visas excluded persons who "assisted the enemy in persecuting civil populations" or who "voluntarily assisted the enemy forces * * *." Constitution of the International Refugee Organization (IRO), Annex I, Part II, 62 Stat. 3051-3052.[4] In addition, the Act provided that no visas were to be issued to persons who were members of, or participated in, "any movement which is or has been hostile to the United States * * *." Section 13, 62 Stat. 1014.

In October 1949, petitioner applied for admission to the United States as a displaced person. As he admitted at trial (Tr. 1518-1522), petitioner willfully falsified his application for a visa by misrepresenting his whereabouts during the war years and omitting any reference to the facts of his Nazi service from 1942 to 1945. Instead, petitioner told investigators for the Displaced Persons Commission that he had been a farmer in Sarny, Poland, until 1942, when he was pressed into forced labor in a factory until 1945 (Govt. Ex. 2, V R. 1882; see Tr. 1518-1520).[5] Before a vice-consul of the United States,

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[4]The Displaced Persons Act adopted the Constitution of the IRO for purposes of determining who were "displaced persons." Section 2, 62 Stat. 1009.

[5]"R." refers to the record in the district court.

petitioner signed a sworn statement containing these false representations as part of his application for a visa to enter the United States under the Displaced Persons Act (Govt. Ex. 3a, V R. 1884-1885). Petitioner's falsehoods were not discovered at the time. As a result, petitioner was issued a visa as a displaced person, and he sailed to the United States the following month (V R. 1886).

The significance of petitioner's actions was described by Kempton Jenkins, who was proffered by the government and accepted by the district court, without objection by petitioner, as an expert witness on the interpretation and application of the Displaced Persons Act (Tr. 712, 715-716, 720-721, 726-727, 734). Jenkins testified, without contradiction, that anyone who had served as a guard in a concentration camp was ineligible as a matter of law for a Displaced Persons Act visa and that a visa was denied in every case where an applicant's guard service came to light (Tr. 760-767). Jenkins testified that guard service constituted persecution of civilians or voluntary assistance to the enemy (or both), either of which rendered an applicant ineligible for a visa under the Act (Tr. 768, 798; see page 4, *supra*).

In 1969, petitioner applied for naturalization as an American citizen. Again, he made no mention of his Nazi service, despite being asked to list all memberships and associations and past foreign military service (V R. 1892). The examining officials "took [petitioner's] visa papers at face value and recommended that [his citizenship] application be granted" (Pet. App. 59a), and it was (V R. 1902).

2. Following a non-jury trial, the district court entered judgment in favor of petitioner (Pet. App. 55a). It held that, as a matter of law, petitioner's admitted deception in applying for a visa was not "material" within the

meaning of 8 U.S.C. 1451(a) because the government had not proven that "the true facts would have warranted denial of citizenship" (Pet. App. 45a). The district court also held that, even if petitioner had willfully concealed material facts in his visa application, thus entitling the government to judgment, the court had power to consider the "equitable and mitigating circumstances" (Pet. App. 54a) of petitioner's law-abiding life in this country, and such circumstances required that petitioner not be denaturalized (*id.* at 55a).

The court of appeals reversed (Pet. App. 57a-66a). It held that, under *Chaunt* v. *United States*, 364 U.S. 350 (1960), a misrepresentation was material if the government proved "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (Pet. App. 61a, quoting *Chaunt* v. *United States*, *supra*, 364 U.S. at 355). Applying that standard to the facts of this case, the court of appeals held that "[t]he evidence before the district court [*i.e.*, the testimony of Kempton Jenkins] clearly and convincingly proved that, had [petitioner] disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in denial of a visa. [Petitioner], then, was guilty of making a misrepresentation and concealment of material facts within the meaning of *Chaunt*" (Pet. App. 64a-65a). Furthermore, the court of appeals held (*id.* at 65a-66a) that the district court erred as a matter of law in concluding that it had authority to enter judgment for petitioner even if the materiality of his misrepresentation had been proven. The court stated that "[t]he denaturalization statute, 8 U.S.C. § 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship" (*id.* at 66a).

ARGUMENT

Petitioner admitted at trial that he had been an armed guard at the Treblinka death camp and had fabricated a wholly fictitious version of his whereabouts during the war years in a successful attempt to obtain a visa under the Displaced Persons Act to enter the United States. The undisputed testimony at trial on the operation and administration of the Displaced Persons Act was that no concentration camp guard was eligible for such a visa and that if petitioner had told the truth in 1949, he would not have received a visa. Indeed, the district court itself found that "[i]f [petitioner's] Treblinka term had been known, it certainly would have prompted an investigation by the Vice-Consul to determine whether [petitioner was] * * * excludable from admission under Section 2(a) or 2(b) of the Displaced Persons Act" (Pet. App. 43a). The district court's error, as the court of appeals correctly pointed out, was in failing to realize that this finding of fact alone was sufficient under *Chaunt* v. *United States, supra*, to establish the materiality of petitioner's concealment.

As both courts below recognized, *Chaunt* is the leading case on what constitutes a "material" deception for purposes of revoking citizenship under Section 1451(a).[6] In *Chaunt*, the government brought a

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[6]Although the statute speaks of the "concealment of a material fact or * * * willful misrepresentation," we assume that concealment, no less than misrepresentation, must be willful (see *Costello* v. *United States*, 365 U.S. 265, 271 n.3 (1961)) and that misrepresentation, no less than concealment, must relate to a material fact.

Neither point is of particular concern in the present case, for petitioner admitted that his deception was willful (Tr. 1520), and whether the deception is labelled a misrepresentation or a concealment is, in this context, unimportant. What is important is the undisputed fact that petitioner concealed his service with the Nazis and misrepresented his activities during that period.

denaturalization action against a citizen who had been naturalized in 1940, alleging that he had concealed at that time a record of three arrests for handbilling, illegal demonstration and breach of the peace in 1929 and 1930. The government contended that these arrests were "material" facts because, had they been disclosed, the government assertedly would have investigated the arrests and discovered that they had resulted from Chaunt's activities on behalf of the Communist Party. Chaunt had admittedly answered "no" when asked if he had ever been arrested, and the government had never investigated Chaunt to determine whether he had been a Communist Party member. The district court ordered citizenship revoked, but this Court reversed.

The Court emphasized the seriousness of giving false or deceptive answers when seeking naturalization. It gave two reasons why "[f]ailure to give frank, honest, and unequivocal answers * * * is a serious matter." 364 U.S. at 352. First, "[s]uppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship." *Id.* at 352-353.

But the Court rejected the government's contention that, had Chaunt disclosed his arrest record, the government would have begun an investigation which would have revealed that Chaunt was a Communist Party official in 1929. The Court did not minimize the importance of Chaunt's Communist affiliation, but it was not persuaded that any such investigation would have followed from disclosure of the arrests. Chaunt had disclosed on his naturalization application that he had been a member of the International Workers' Order (IWO), which the Court assumed to be a Communist

front. That disclosure, said the Court, was a "much less tenuous and speculative nexus with the Communist Party" than the arrests that the government complained of (364 U.S. at 355), yet the government had not investigated Chaunt at the time of his application despite the IWO revelation. The Court was unwilling to believe that the "tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations" was really material in light of the government's inaction when faced with more significant evidence of the affiliation *(ibid.)*.

The Court was careful to note, however, that, had Chaunt not disclosed his affiliation with the International Workers' Order, "failure to report the arrests would have had greater significance," for "[i]t could then be forcefully argued that failure to disclose the arrests was part and parcel of a project to conceal a Communist Party affiliation." 364 U.S. at 355. But the Court concluded that the government had failed to show that either the arrests would have "warranted denial of citizenship" or that "their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Ibid.*

In short, this Court in *Chaunt* was not willing to allow citizenship to be revoked for concealing facts that, even if disclosed, would not have triggered an investigation. A concealed fact is material, said the Court, only when it either would have justified denial of citizenship "in and of [it]sel[f]" or "might have led to the discovery of" disqualifying facts. The two tests of materiality are thus independent of each other, and this Court's use of the disjunctive establishes that denaturalization may follow

from a concealment that is material under either one of the tests. *Chaunt* v. *United States*, *supra*, 364 U.S. at 352-353, 355.

With the exception of the Ninth Circuit, all courts of appeals that have considered the question of what is a "material" deception under Section 1451(a) have correctly concluded that *Chaunt* allows materiality to be shown in either one of two ways. First, the government may prove that the facts that the defendant concealed or misrepresented, if revealed, would have themselves justified denial of citizenship. Second, the government may prove that the concealed or misrepresented facts, if revealed, might have been useful in an investigation possibly leading to the discovery of other facts justifying denial of citizenship. As the court of appeals explained it here, following *United States* v. *Oddo*, 314 F. 2d 115 (2d Cir.), cert. denied, 375 U.S. 833 (1963), "a fact suppressed or misstated that would not, in and of itself, have warranted denial of citizenship is material nonetheless if its disclosure would have led the government to conduct an inquiry that might have uncovered other facts, justifying denial of citizenship." Pet. App. 61a-62a (citation omitted). As noted above, the district court found that the fact petitioner suppressed would have led to such an inquiry (Pet. App. 43a); its entry of judgment for petitioner was therefore erroneous, as the court of appeals held (Pet. App. 65a-66a).

Petitioner nonetheless contends (Pet. 11) that "a suppressed fact is not material unless the truth would have justified a denial of an [i]mmigration [v]isa." But as the court of appeals stated (Pet. App. 62a), this contention "destroy[s] the utility of the second *Chaunt* test, since it would require, as does the first *Chaunt* test, that the government prove ultimate facts warranting denial of citizenship." This reading of *Chaunt* is consistent not only with the language of that decision

(see Pet. App. 62a), but with common sense as well. The court of appeals correctly observed (Pet. App. 63a; footnote omitted):

> [Petitioner's construction] * * * would allow an applicant for a visa or for citizenship to lie about his background and thereby prevent the government from investigating his fitness at a time when he has the burden of proving eligibility. If his deception is later discovered, [petitioner's] approach would require the government to carry out three difficult tasks: to conduct an investigation into the past, discover ultimate facts warranting disqualification, and prove those facts in court by clear and convincing evidence.

As the court concluded, "if that were the law, an applicant with something to hide would have everything to gain and nothing to lose by lying under oath to the INS" (Pet. App. 63a).

The court of appeals' approach is solidly based in precedent. As the Third Circuit said in rejecting the argument that petitioner now presents:

> The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity.

United States v. *Montalbano*, 236 F. 2d 757, 759 (1956). Accord, *Corrado* v. *United States*, 227 F. 2d 780 (6th Cir. 1955). The Second Circuit likewise has rejected petitioner's interpretation of Section 1451(a). In *United*

States v. *Oddo*, *supra*, 314 F. 2d at 118, then-Circuit Judge Marshall, writing for the court, stated:

> Failure to disclose a record of prior arrests, even though none of those arrests by itself would be a sufficient ground for denial of naturalization, closes to the Government an avenue of enquiry which might conceivably lead to collateral information of greater relevance. United States v. Montalbano * * *; Corrado v. United States * * *. As the Court said in Chaunt, "An arrest, though by no means probative of any guilt or wrongdoing, is sufficiently significant as an episode in a man's life that it may often be material at least to further enquiry." 364 U.S. at 354 * * *. Oddo denied the Government the opportunity to make that enquiry.

The First Circuit has also read *Chaunt* in this fashion. In *Langhammer* v. *Hamilton*, 295 F. 2d 642 (1961), an action to avoid deportation, the alien argued that his former membership in the Communist Party was "involuntary" and thus under *Chaunt* his deliberate failure to disclose it on his visa application was not material. The court of appeals answered (*id.* at 648):

> In essence [appellant] argues that a misrepresentation is not material unless the alien would definitely have been excluded on the true facts. We do not believe this to be the law and, consequently, had we now agreed that appellant's membership was involuntary, such determination would not have operated *nunc pro tunc* to render his omission non-material.

This leaves only the Ninth Circuit as having expressed the view that the government must prove the existence of ultimate facts that would have justified the denial of

citizenship. See *United States* v. *Rossi*, 299 F. 2d 650 (9th Cir. 1962); *LaMadrid-Peraza* v. *INS*, 492 F. 2d 1297 (9th Cir. 1974). Those decisions are unsound for several reasons. First, as shown above, the Ninth Circuit was only half right when it stated that *Chaunt* "held that a fact suppressed or misstated is not material to an alien's entry unless the truth would have justified a refusal to issue a visa." *LaMadrid-Peraza* v. *INS*, *supra*, 492 F. 2d at 1298. That reading plainly ignores the second *Chaunt* test. Moreover, the Ninth Circuit's reading of *Chaunt* *provides* precisely the incentive to lie that other courts construing *Chaunt* have properly characterized as pernicious.[7]

Assuming that the Ninth Circuit would continue to adhere to *Rossi* and *LaMadrid-Peraza* in future cases, however, it is unnecessary for this Court to resolve the conflict here, because the undisputed evidence at trial shows that the judgment of denaturalization is correct even if the Ninth Circuit's reading of *Chaunt* is followed. That reading, as we have explained, effectively confines *Chaunt* to only the first test articulated in the opinion—that is, a concealment or misrepresentation is "material" under Section 1451(a), in the Ninth's Circuit's view, only if "the truth would have justified a refusal to issue a visa." *LaMadrid-Peraza* v. *INS*, *supra*, 492 F. 2d at 1298.

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[7]In addition, it is clear that the Ninth Circuit did not give careful consideration to the question. *Chaunt* was decided after *Rossi* had been briefed and submitted to the Ninth Circuit, and that court, although recognizing the importance of the case, apparently did not invite further briefing. *United States* v. *Rossi*, *supra*, 299 F. 2d at 652 n.3. To compound the matter, the *Rossi* court followed two 1938 appellate decisions that, in our view, could no longer be considered persuasive after this Court's decision in *Chaunt*. See 299 F. 2d at 652-653. *LaMadrid-Peraza* was a brief per curiam opinion that did not discuss *Corrado*, *Montalbano*, *Oddo*, *Langhammer* or other cases squarely in conflict with *Rossi*.

In this case, "the truth" of petitioner's wartime activities is undisputed. Petitioner admitted at trial that he was an armed guard at the Nazi death camp at Treblinka (see, *e.g.*, Tr. 1297-1331, 1442, 1452, 1467-1468, 1495, 1507-1509, 1546, 1564-1565). The government's expert witness on the administration of the Displaced Persons Act testified without contradiction that any visa applicant who had served as a guard in a concentration camp during the war was ineligible as a matter of law for a visa and that visas were in fact denied to every applicant whose concentration camp service was known (Tr. 760-767, 788, 790, 804, 805-809). On this evidence alone, then, the judgment of denaturalization is correct because "the truth would have justified a refusal to issue a visa." *LaMadrid-Peraza* v. *INS*, *supra*, 492 F. 2d at 1298.

The court of appeals, finding that the evidence at trial established materiality under the second and less restrictive of the two *Chaunt* tests (Pet. App. 64a-65a), declined to reach the question whether materiality had also been established under the first test. But, for the reasons just stated, the undisputed evidence plainly established materiality even under that test, and thus the Ninth Circuit would have reached the same result that the Fifth Circuit did here. In these circumstances, this case is not a proper vehicle to resolve whatever differences may continue to exist between the Ninth Circuit on the one hand and the First, Second, Third, Fifth and Sixth Circuits on the other.[8]

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[8]Petitioner contends (Pet. 12-14) that the evidence on this record is insufficient to establish that, had petitioner told the truth about his Nazi service to consular officials when applying for a visa, he would have been denied a visa. Petitioner's primary assertion in this regard appears to be that because the government did not actually produce the vice-consul who approved petitioner's visa, one cannot

2. Petitioner also contends (Pet. 14-15) that the district court correctly concluded (Pet. App. 49a-55a) that, even assuming that petitioner "had willfully concealed material facts," the court could preserve petitioner's citizenship in the exercise of its equitable jurisdiction " 'to ameliorate hardship and injustice * * *' " (*id.* at 53a). Although the district court recognized that its action was wholly unprecedented (*id.* at 52a), the court reasoned that it must have the same discretion to *refuse* to denaturalize as it has to *grant* naturalization (*id.* at 54a).

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say with assurance that that vice-consul would have denied petitioner's application had petitioner actually revealed his true background.

This assertion is unsound. Kempton Jenkins was proffered by the government, and accepted without objection by petitioner, as an expert in the administration and application of the Displaced Persons Act. His testimony, which was never disputed, was that concentration camp guards such as petitioner were categorically ineligible for visas. If petitioner wished to dispute that evidence, he should have done so at trial. Petitioner has never suggested any reason why he did not do so and, more to the point, he offers no reason to suppose that the vice-consul who dealth with petitioner's application, had he testified, would have disagreed with Jenkins. Petitioner's position is thus nothing more than an assertion that the district court should not have credited the undisputed testimony of the government's expert witness because it did not hear another witness who, petitioner speculates, might have given evidence contrary to the expert.

Nor did the court of appeals substitute its judgment on Jenkins' credibility for that of the district court, as petitioner asserts (Pet. 14). The district court itself found, on the basis of the expert's testimony, that if petitioner had revealed his Nazi service, an investigation would have resulted (Pet. App. 43a). The district court concluded as a matter of law, however, that this finding alone was not sufficient to revoke petitioner's citizenship under *Chaunt*. The court of appeals did no more than reverse the district court's legal conclusion. See Pet. App. 64a-65a.

This reasoning is incorrect, and the court of appeals properly rejected it (Pet. App. 65a-66a). As the court below stated (*id.* at 65a-66a; citations omitted):

> There is a crucial distinction between a district court's authority to grant citizenship and its authority to revoke citizenship. In the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets [the] requirements for naturalization * * *. Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship.

Petitioner offers no substantial answer to this self-evident proposition. Although he casts the district court's rationale as "not inconsistent with its holding that the Government failed to meet its burden" of proof (Pet. 15), the fact is that the district court's rationale was intended to be effective only if the court were reversed, as it was, on the materiality issue (Pet. App. 49a).

In short, even putting aside the question whether it is "equitable" to continue the benefits of United States citizenship to someone such as petitioner, the denaturalization statute simply does not empower the district court to do what it attempted here. As the House Report on Section 1451(a) remarked, "if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition was granted," then the citizenship is "illegally procured." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 39 (1961). And as this Court stated in *Johannessen* v. *United States*, 225 U.S. 227, 241 (1912), and repeated in *Knauer* v. *United States*, 328 U.S. 654, 673 (1946):

> An alien has no moral nor constitutional right to retain the priveleges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued.

See Pet. App. 66a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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